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SUPREME COURT, U. S.

In the Supreme Court of the United States

OCTOBER TERM, 1969

FLOYD FEATHERSTON, PETITIONER

v.

JOHN MITCHELL, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

JOHNNIE M. WALTERS,
Assistant Attorney General,

JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys,
Department of Justice,
Washington, D. C. 20530

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21-30) is not yet officially reported. The memorandum order of the district court denying petitioner's petition for a writ of habeas corpus (R. 144-165)[1] is reported as *Featherston* v. *Clark*, 293 F. Supp. 508 (W.D. Tex.).

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[1] "R." references are to the printed appendix certified to this Court from the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on November 10, 1969. The petition for a writ of certiorari was filed on January 12, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the constitutional prohibition against double jeopardy bars retrial of a defendant whose first trial ended when the trial judge ordered him committed to a government hospital for a mental examination and declared a mistrial, upon finding that medical testimony given by petitioner's physician gave reasonable cause to believe that petitioner might be unable to understand the proceedings against him or properly to assist in his own defense.

STATUTE INVOLVED

18 U.S.C. 4244 is set out in the petition (pp. 3-4).

STATEMENT

On February 17, 1968, petitioner was arraigned and pleaded not guilty on an indictment charging him with willfully attempting to defeat and evade personal income taxes for 1961, 1962 and 1963. At that time, his attorney informed the district court that no issue of mental incompetency would be raised. (R. 145.)

On October 8, 1968, in the course of a jury trial which commenced on September 17, 1968, petitioner

called as a defense witness his personal physician, Dr. George Hermann. In a voir dire examination conducted for the purpose of informing the court what issues would be raised by this medical evidence,[2] Dr. Hermann testified that he had been treating petitioner for arteriosclerosis and diabetes mellitus since 1959 and that these interacting diseases caused petitioner to suffer episodes of confusion and lapse of memory for periods varying from a few hours to several days at a time. Dr. Hermann also testified that such episodes are not obvious to other people and that during such episodes petitioner can transact business and appear normal though not fully aware of what he is doing. (R. 29-35.) Dr. Hermann answered "I am afraid so, yes", to the court's question whether this condition would affect petitioner's ability to take the witness stand and to cooperate with and assist his counsel in the conduct of his defense. (R. 32, 44-45.)

After Dr. Hermann's testimony, the United States Attorney made an oral motion to adjourn the case until an evaluation could be made of petitioner's competency to commit the offenses charged and capacity to cooperate with counsel and assist in his own defense (R. 37). Petitioner's counsel declined to join in this motion and objected to a mistrial (R. 38, 43).

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[2] Petitioner's counsel declined to inform the district court as to what jury instructions would be requested on the basis of this evidence (R. 39-40) though the district court found (R. 150) that two purposes of the evidence were to explain petitioner's failure to take the witness stand and to raise a doubt as to his mental capacity to form the specific intent necessary to commit the offenses charged.

The district court thereupon committed petitioner for a period of not more than 90 days to a hospital to be designated by the Attorney General for examination and a report on his mental condition (R. 59-61). A mistrial order was then entered (R. 61-62).

Petitioner's counsel objected to the order for commitment, stating that petitioner never intended to contend he could not assist in his own defense, and requesting either admission to bail or an order that the examination be conducted by local doctors in Del Rio or San Antonio, Texas (R. 48-49).

On October 15, 1968, petitioner filed a petition for a writ of habeas corpus, alleging that his continued confinement was illegal because the mistrial order was an abuse of discretion and that he could not again be placed in jeopardy of conviction (R. 11-23). At a hearing on this petition, Dr. Hermann gave further details, largely repetitive, about petitioner's medical history and condition (R. 227-253, 463-467).

In its memorandum order denying the petition (R. 144-165), the district court found the facts as stated herein and concluded that, on the evidence of petitioner's mental incompetency to stand trial, the United States Attorney was required to make a motion under 18 U.S.C. 4244 for a judicial determination of competency, and that it was "mandatory" for the district court to cause a mental examination to be made and to make a determination of petitioner's mental competency before proceeding with the cause. It found that prior to the testimony of Dr. Hermann, neither the government nor the district court had reasonable cause to require such a mental examina-

tion. The court noted the elusive nature of petitioner's episodes of amnesia and the necessity of proper diet and regular insulin treatment to bring his illness under control. The district court observed that the issue of mental competency was not confined to petitioner's condition on October 8, 1968, but extended to the entire course of the trial prior thereto and that the problem was "new" to the court. It reasoned that a hasty examination by local psychiatrists would be insufficient even if it resulted in a reliable determination of petitioner's competency on October 8, 1968, because the evidence had put in question petitioner's condition throughout the entire trial. The district court stated that its experience with local medical personnel and facilities was such that it found that a complete examination at the Springfield, Missouri, Federal Medical Center, where doctors were familiar with the legal standards for trial competency, was needed to enable the court to determine whether petitioner could stand trial.

The district court concluded (R. 164) that "there was a manifest necessity for a mistrial" and denied the petition for a writ of habeas corpus. It ordered petitioner released to the custody of Dr. Hermann pending determination of the cause, on conditions permitting Dr. Hermann to deliver petitioner into custody if he did not follow the regimen prescribed by the doctor (R. 467, 511).

ARGUMENT

The stated facts show that the medical testimony presented to the court by petitioner's witness created,

without prior notice or warning, a baffling, if not insoluble, problem in retrospective fact finding. The court of appeals aptly summarized the situation and the almost inevitable conclusion that a mistrial was necessary (Pet. App. 29-30):

> The testimony of Dr. Hermann raised a serious question respecting the defendant's ability to understand the nature of the proceedings against him and to assist in his own defense on every day of the trial. Because such a question was raised, we conclude under the circumstances here that the trial could not have progressed no matter how or where the subsequent psychiatric examination required by section 4244 was made.

This dilemma was noted by the district court prior to declaring a mistrial (R. 45), and in its subsequent opinion the district court said (R. 162-163):

> The point petitioner misses is that a mistrial in this case was "manifestly necessary" regardless of how or where the mental examination of petitioner was held. A temporary recess of the trial, to be resumed after an examination and report of a local psychiatrist and a judicial determination, if warranted, that petitioner was competent on October 8, 1968, the day all this arose, would not have "saved the trial" as petitioner alleges. While this procedure would have settled the question of petitioner's mental competency on that day, it would have told the Court nothing of his mental competency during the prior three-and-one-half weeks of trial. The nature of petitioner's condition is such that even a physician cannot tell if he is in one of his "spells" or "blackouts" by mere observation, and only a

> contemporaneous blood test and examination can reveal whether petitioner is truly normal on any one day. Thus, a conviction in this case would have meant nothing. It would forever be open to attack on grounds that could not have been refuted by the Government or determined against the petitioner by the Court.

As acknowledged by the court of appeals (Pet. App. 24-25), the district court was "required" by 18 U.S.C. 4244 to order a determination of mental competency, and, in view of the circumstances, it appears clear that the trial could not safely have been recessed long enough to permit an adequate examination to take place with any expectation that the integrity of the trial in process could be maintained. These circumstances include, *inter alia*, the obvious necessity for correcting and stabilizing the physical condition which affects petitioner's mental competency, the length of the observation period required to detect the occurrence of lapses of memory, the admitted lack of qualified psychiatrists in Del Rio, Texas, the inevitable delays in investigating the existence of, and procuring, adequate facilities and medical services in San Antonio, Texas, the dangers inherent in prolonged separation of the jury and their increasingly hazy recollection of the evidence, and the entire complex of intangible elements which are recognized in the respect accorded to the exercise of discretion by a trial judge. The stated preference of the trial judge for commitments to the Federal Medical Center in no way shows that this discretion was not exercised.

There was in the court's mistrial ruling "no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed." *Wade* v. *Hunter*, 336 U.S. 684, 688-689. Nor is this a case where the prosecutor procured the mistrial to extricate himself from difficulties resulting from his inability to have his witnesses present when his case was called for trial, as in *Downum* v. *United States*, 372 U.S. 734. The circumstances vindicate the opinion of the trial court that "manifest necessity" (R. 164) dictated a mistrial ruling, and called for the application of this Court's language in *Gori* v. *United States*, 367 U.S. 364, 368:

> Where, for reasons deemed compelling by the trial judge, who is best situated intelligently to make such a decision, the ends of substantial justice cannot be attained without discontinuing the trial, a mistrial may be declared without the defendant's consent and even over his objection, and he may be retried consistently with the Fifth Amendment.

United States v. *Jorn*, No. 84, October Term, 1969, now pending decision in this Court, does not require review of petitioner's case on the merits, or delay in disposing of his petition. In *Jorn*, as in *Gori* v. *United States*, *supra*, the occasion for the mistrial was the trial court's doubts about the manner in which the prosecution was presenting its case. Here, the occasion was a concededly mandatory interruption in the trial caused by petitioner's own evidence of facts known to him but unknown to the prosecutor or the district court prior to the commencement of the trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

JOHNNIE M. WALTERS,
Assistant Attorney General.

JOSEPH M. HOWARD,
JOHN P. BURKE,
Attorneys.

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